FILE COPY

Supreme Court, U.S.
FILED
NOV 12 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

Nos. 459, 473

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

Petitioner,

v.

FEDERAL POWER COMMISSION, ET AL.,

Respondent

THE UNITED GAS IMPROVEMENT COMPANY, PHILADELPHIA ELECTRIC COMPANY,

Petitioners,

v.

FEDERAL POWER COMMISSION, ET AL.,

Respondent

ON PETITONS FOR WRITS OF CERTIORAI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICI CURIAE OF THE MEMBER MUNICIPALITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, IN SUPPORT.

For list of counsel,
See inside front cover

Counsel

Joe W. Anderson,
City Attorney,
Chattanooga, Tennessee.

Roger Arnebergh,
City Attorney,
Los Angeles, California.

John Torrey Berger,
City Attorney,
Kirkwood, Missouri.

Alexander G. Brown,
City Attorney,
Portland, Oregon.

J. Elliott Drinard,
City Attorney,
Richmond, Virgina.

N. H. Goldstick,
Corporation Counsel,
Detroit, Michigan.

Dion R. Holm,
City Attorney,
San Francisco, California.

Claude V. Jones,
City Attorney,
Durham, North Carolina.

Ralph S. Locher,
Director of Law,
Cleveland, Ohio.

Walter J. Mattison,
City Attorney,
Milwaukee, Wisconsin.

John C. Melaniphy,
Corporation Counsel,
Chicago, Illinois.

Charles A. Sawyer,
City Attorney,
Minneapolis, Minnesota.

Barnett I. Shur,
Corporation Counsel,
Portland, Maine.

A. C. Van Soelen,
Corporation Counsel,
Seattle, Washington.

Charles H. Tenney,
Corporation Counsel,
New York City.

Charles S. Rhyne,
J. Parker Connor,
400 Hill Building,
Washington 6, D. C.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

Nos. 459, 473

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

Petitioner,

v.

FEDERAL POWER COMMISSION, ET AL.,

Respondent

THE UNITED GAS IMPROVEMENT COMPANY, PHILADELPHIA ELECTRIC COMPANY,

Petitioners,

v.

FEDERAL POWER COMMISSION, ET AL.,

Respondent

ON PETITONS FOR WRITS OF CERTIORAI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICI CURIAE OF THE MEMBER MUNICIPALITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, IN SUPPORT.

Opinions Below

The opinion of the United States Court of Appeals is not yet reported. (See decision printed in Petition of Public Service Commission of the State of New York, Appendix

A; at pp. A-1 to A-7, dissenting opinion at pp. A-7 to A-8, the judgment of the Court at p. A-9, and the order of the Court denying rehearing at p. A-10. The opinion of the Federal Power Commission (R. 481-556) is reported at 20 F.P.C. 264.

Jurisdiction

The asserted grounds for jurisdiction are set forth in the Petitions of Public Service Commission of the State of New York and the other Petitioners.

Question Presented

Did the United States Court of Appeals err in failing to remand this case to the Federal Power Commission in light of the case of *Atlantic Refining Company v. Public Service Commission of the State of New York*, 360 U.S. 378.

Statutes Involved

The applicable provisions of the Natural Gas Act, June 24, 1938, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.* are printed at pages B-1 to B-4 in Appendix B of the Petition of Public Service Commission of the State of New York.

Interest of Amici Curiae

The National Institute of Municipal Law Officers (NIMLO) is an organization composed of more than eleven hundred (1100) municipalities located in each of the 50 states, the District of Columbia and in the territory of Puerto Rico. The cities which encompass this membership act through their chief legal officers, who are designated as the City Attorney, City Solicitor, Corporation Counsel, Director of Law and so forth.

This brief is filed pursuant to Rule 42(4) of this Court. The members of NIMLO are political subdivisions of states and this brief is sponsored by their authorized law officers.

The members of NIMLO have been constantly intent upon assuring adequate and complete regulation of natural gas, pursuant to the mandate of the Congress when it enacted the Natural Gas Act of 1938 (sometimes hereinafter referred to as the "Act."). In fact, the members of NIMLO were among the sponsors of the Natural Gas Act when it was adopted. The member cities were represented by brief *amici curiae* in the case of *Oklahoma Natural Gas Company* v. *Federal Power Commission*, cert. granted 358 U.S. 877, cert. dismissed, 358 U.S. 948, which was a companion case to the case of *Atlantic Refining Company* v. *Public Service Commission of the State of New York*, 360 U.S. 378 (hereinafter sometimes referred to as the "*Catco*" case), but was dismissed on motion of the petitioner. This Court, however, rendered a decision in the *Catco* case, bearing upon a similar proposition as that which was included in the *Oklahoma Natural* case and since the issue involved in the instant case vitally affects every municipality in the United States which purchases natural gas for its own consumption, or whose residents are consumers of natural gas, this brief *amici curiae* is filed in support of a grant of certiorai and a reversal of the decision of the Court of Appeals.

Statement of Facts

The statement of facts is set forth by Petitioners and will not be repeated herein.

Argument

In the *Catco* case this Court held that the purpose of the Natural Gas Act was to "underwrite just and reason-

able rates to the consumer", 360 U.S. 388. This is, of course, in keeping with the accepted principle enunciated by this Court in the cases of *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, 610, 611-612, and *Phillips Petroleum Company* v. *State of Wisconsin, City of Detroit et al*, 347 U.S. 672, 685, that the primary aim of the Natural Gas Act was protection of consumers against exploitation at the hands of natural gas companies. The decision of the Court of Appeals, however, has breached the protection afforded consumers in the Natural Gas Act by erroneously interpreting this Court's *Catco* decision.

As in *Catco*, the instant case is one involving the grant of certificates of public convenience and necessity under Section 7 of the Natural Gas Act. The Federal Power Commission (hereinafter sometimes referred to as FPC) granted these certificates to the producers involved without conditioning the proposed prices to be charged by the producers to the pipeline purchaser. The prices which were certificated by the FPC were excessive. As this Court held in the *Phillips* case,[1] the regulation of rates charged for all wholesales of natural gas for resale in interstate commerce was the intent of the act. It is not reasonable to regulate one segment of an industry and leave another segment free to charge whatever the market will bear. Prices charged by producers are passed along to the ultimate consumer by virtue of the fact that the interstate pipe line companies and the distribution companies include these prices in the rates which are charged the consumers. Thus, unless there is effective regulation of the *initial* price charged by the producer there can be no adequate protection for the ultimate consumer—the individual for

[1] *Supra*, 347 U.S. 682-683.

whose benefit the Congress passed the Natural Gas Act. This unassailable proposition was recognized by this Court in the *Catco* decision.

However, in the face of the *Catco* decision, the Court of Appeals failed to follow the dictate of this Court by attempting to distinguish the case away and by relying upon factors which this Court never indicated were sufficient to support a decision as rendered by the FPC. The FPC held that evidence of an existing market for the sales at the price proposed and of economic feasibility was sufficient evidence to support the issue of permanent certificates unless there is evidence contrary to show that the prices are unreasonable and would adversely affect the public interest (R. 10,345-10,346). This Court however, has enunciated that the price to be charged by a producer is a "consideration of prime importance" (360 U.S. 391) in determing whether certificates should issue. The Commission thus acted in a manner contrary to that which is required by the *Catco* decision.

The Commission rendered its decision in the instant case prior to the time a decision was rendered by this Court in the *Catco* case and herein lies the paramount reason why this Court should grant certiorai and remand the case to the Federal Power Commission for the taking of further evidence. As Judge Hastie stated in his dissenting opinion:

> ". . . it seems appropriate to ask whether the Commission would have proceeded in the way it did and reached the result it reached here, had the subsequent teaching of the *Atlantic Refining* case then been before it.
>
> Certainly the *Atlantic Refining* case indicates an approach and emphasizes considerations which might well have led the Commission to a different result . . ."

(Petition of Public Service Commission of New York, App. A, pp. A-7, A-8)

The criteria employed by the FPC in the instant case were held to be insufficient by this Court in *Catco*. It is the duty of the FPC to examine the justness and reasonableness of a proposed rate and in particular where the initial rate of a producer in a certificate proceeding is involved. Commissioner Connole, in his dissenting opinions in decisions rendered by the FPC prior to *Catco*, profoundly set forth the reasons why the initial rate of a producer is so all important. In the *Superior Oil*[2] case he stated:

> "This proceeding is but another turn of the wheel. Once again a buyer has to meet the highest price being paid by any other pipeline if it hopes to do business with the producer involved. *And once again the opportunity to brake the headlong rush is lost.*" (Emphasis supplied)

This Court in *Catco* designated what is to be done in order to brake this headlong rush of spiralling prices. The Court of Appeals has refused to follow the decision in that case and has therefore erred. Should this decision be permitted to stand, exploitation of the consumer is inevitable.

[2] Re the Superior Oil Company, FPC Docket No. G-12121, decided May 9, 1958, 23 PUR 3d 331.

Conclusion

For the foregoing reasons the petitions for a writ of certiorari should be granted.

Respectfully submitted,

JOE W. ANDERSON,
City Attorney,
Chattanooga, Tennessee.

ROGER ARNEBERGH,
City Attorney,
Los Angeles, California.

JOHN TORREY BERGER,
City Attorney,
Kirkwood, Missouri.

ALEXANDER G. BROWN,
City Attorney,
Portland, Oregon.

J. ELLIOTT DRINARD,
City Attorney,
Richmond, Virginia.

N. H. GOLDSTICK,
Corporation Counsel,
Detroit, Michigan.

DI[illegible] R. HOLM,
City Attorney,
San Francisco, California.

CLAUDE V. JONES,
City Attorney,
Durham, North Carolina.

RALPH S. LOCHER,
Director of Law,
Cleveland, Ohio.

WALTER J. MATTISON,
City Attorney,
Milwaukee, Wisconsin.

JOHN C. MELANIPHY,
Corporation Counsel,
Chicago, Illinois.

CHARLES A. SAWYER,
City Attorney,
Minneapolis, Minnesota.

BARNETT I. SHUR,
Corporation Counsel,
Portland, Maine.

A. C. VAN SOELEN,
Corporation Counsel,
Seattle, Washington.

CHARLES H. TENNEY,
Corporation Counsel,
New York City.

CHARLES S. RHYNE,
J. PARKER CONNOR,
Attorneys for amici curiae.

Certificate of Service

I, J. Parker Connor, attorney for *amicus curiae* hereby certify that I have this day served upon the following-named parties a copy of the foregoing brief *amicus curiae* by depositing true and correct copies thereof in the United States mail, first class, postage prepaid, and airmail, postage prepaid, addressed as follows:

J. Lee Rankin, Esquire
Solicitor General
Department of Justice
Washington 25, D. C.

Willard W. Gatchell, Esq.
General Counsel
Federal Power Commission
Washington 25, D. C.

Charles B. Ellard, Esquire
William R. Dotson, Esquire
Edward J. Kremer, Jr., Esq.
P. O. Box 2819
Dallas 21, Texas

Bernard A. Foster, Jr., Esq.
Sherman S. Poland, Esquire
Ross, Marsh & Foster
725 - 15th Street, N. W.
Washington 5, D. C.
Attorneys for The Atlantic Refining Company

Gentry Lee, Esquire
Cecil C. Cammack, Esquire
Cities Service Building
Bartlesville, Oklahoma
Attorneys for Cities Service Production Company

Lloyd F. Thanhouser, Esq.
Bruce R. Merrill, Esquire
P. O. Box 2197
Houston, Texas
Attorneys for Continental Oil Company

Clayton L. Orn, Esquire
Robert M. Vaughn, Esquire
539 South Main Street
Findlay, Ohio

James D. Parriott, Esquire
1625 Eye Street, N. W.
Washington 6, D. C.
Attorneys for The Ohio Oil Company

L. A. Thompson, Esquire
W. W. Heard, Esquire
J. P. Hammond, Esquire
P.O. Box 591
Tulsa 2, Oklahoma

William J. Grove, Esquire
Carroll L. Gilliam, Esquire
Dow, Lohnes & Albertson
600 Munsey Building
Washington 4, D. C.
Attorneys for Pan American Petroleum Corporation

Rayburn L. Foster, Esquire
Harry D. Turner, Esquire
H. K. Hudson, Esquire
Kenneth Heady, Esquire
James G. Williams, Jr. Esq.
Phillips Building
Bartlesville, Oklahoma

Charles E. McGee, Esquire
1145 - 19th Street, N. W.
Washington, D. C.

Lambert McAllister, Esquire
2000 K Street, N. W.
Washington, D. C.
Attorneys for Phillips Petroleum Company

Carl Illig, Esquire
William J. Merrill, Esquire
P. O. Box 2180
Houston 1, Texas
Attorneys for Humble Oil and Refining Company

Kent H. Brown, Esquire
55 Elk Street
Albany 1, New York
Attorney for Public Service Commission of New York

Robert W. Henderson, Esq.
700 Mercantile Bank Bldg.
Dallas 1, Texas

Robert E. May, Esquire
1700 K Street, N. W.
Washington 6, D. C.

Ralph B. Shank, Esquire
730 Mercantile Securities Bldg.
Dallas 1, Texas
Attorneys for W. H. Hunt, Trustee for Hassie Hunt Trust

Frank C. Bolton, Esquire
Ross Madole, Esquire
William S. Richardson, Esq.
P. O. Box 900
Dallas, Texas
Attorneys for Magnolia Petroleum Company

John C. Snodgrass, Esquire
35 East Wacker Drive
Chicago 1, Illinois
Attorney for The Pure Oil Company

Joiner Cartwright, Esquire
Herf M. Weinert, Esquire
P. O. Box 2831
Beaumont, Texas
Attorneys for Sun Oil Company

Paul F. Schlicher, Esquire
135 East 42nd Street
New York, New York

Alfred C. DeCrane, Jr. Esq.
P. O. Box 2332
Houston, Texas

Frank H. Strickler, Esquire
815 - 15th Street, N. W.
Washington, D. C.
Attorneys for Texaco Seaboard, Inc.

L. A. Gibbons, Esquire
Union Oil Center
Los Angeles, California

George D. Horning, Esquire
Patrick G. Sullivan, Esquire
John J. Ross, Esquire
Hogan & Hartson
810 Colorado Building
Washington, D. C.
Attorneys for Union Oil Company of California

James B. Henderson, Esquire
William N. Bonner, Esquire
3100 Travis Street
Houston, Texas

Richard J. Connor, Esquire
John T. Miller, Jr., Esquire
Thomas F. Brosnan, Esquire
Gallagher, Connor & Boland
821 - 15th Street, N. W.
Washington, D. C.
Attorneys for Transcontinental Gas Pipe Line Corporation

J. David Mann, Jr., Esquire
Morgan, Lewis and Bockius
1230 Pennsylvania Building
Washington 4, D. C.
Attorney for United Gas Improvement, Philadelphia Gas Works Division

Thomas Fletcher, Esquire
Robert A. Shepherd, Jr., Esq.
1414 Floor Esperson Bldg.
Houston 2, Texas
Attorneys for Tidewater Oil Company
Attorneys for Oil Participations, Inc.

S. Graff Miller, Esquire
1000 Chestnut Street
Philadelphia 5, Penn.
Attorney for Philadelphia Electric Company

Dated at [illegible] this [illegible] day of November, 1959.

J. PARKER CONNOR,
Attorney for Amicus Curiae.